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BEFORE THE ARIZONA CORPORATION COMMISSION

MIKE GLEASON, CHAIRMAN
WILLIAM A. MUNDELL
JEFF HATCH-MILLER
KRISTIN K. MAYES
GARY PIERCE

IN THE MATTER OF THE COMPLAINT OF THE BUREAU OF INDIAN AFFAIRS, UNITED STATES OF AMERICA, AGAINST MOHAVE ELECTRIC COOPERATIVE, INC. AS TO SERVICES HAVASUPAI AND HUALAPAI INDIAN RESERVATIONS	DOCKET NO. E-01750A-05-0579 BUREAU OF INDIAN AFFAIRS' REPLY STATEMENT OF FACTS IN IN SUPPORT OF ITS MOTION FOR PARTIAL SUMMARY JUDGMENT AND IN RESPONSE TO MOHAVE ELECTRIC INC.'S STATEMENT OF DISPUTED FACTS AND ADDITIONAL FACTS IN RESPONSE TO BIA'S MOTION FOR PARTIAL SUMMARY JUDGMENT

The Bureau of Indian Affairs ("BIA") moved for partial summary judgment ("BIA MSJ") and supported the motion with a separate statement of facts ("BIA SOF"). Mohave Electric Cooperative, Inc. ("MEC") correspondingly responded to the motion ("MEC Response") and correspondingly filed a statement of disputed facts and facts in support of its response ("MEC SOF"). The BIA submits this reply in support of its SOF and response to the MEC SOF. The BIA incorporates this into its reply in support of summary judgment which is being filed concurrently.

I. SUMMARY JUDGMENT PRINCIPLES AND STANDARDS

The BIA supported its MSJ with admissible evidence. BIA SOF, on file. In response to the BIA MSJ, MEC was required to set forth specific facts showing there is a genuine issue for trial. Ariz. R. Civ. Proc. 56(e); see also, Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250 (1986) ("[W]hen a properly supported motion for summary judgment is made, the adverse party 'must set forth specific facts showing that there is a genuine issue for trial.'") (citation and footnotes omitted). In ruling on a motion for summary judgment, only admissible evidence can be considered by the court. Briskman v. Del Monte Mortgage Co., 10 Ariz. App. 263, 266, 458 P.2d 130, 133 (Ct. App.

1969) ("in ruling upon a motion for summary judgment, only such matters stated therein as would be admissible in evidence may properly be considered by the court"). Accordingly, unsupported allegations in opposition are not sufficient to defeat a motion for summary judgment. Stanley v. University of S. California, 178 F.3d 1069, 1076 (9th Cir. 1999); Tamsen v. Weber, 166 Ariz. 364, 368, 820 P.2d 1063, 1067 (Ct. App. 1990) ("When a summary judgment movant makes a *prima facie* motion, the opponent cannot defeat the motion merely by asserting facts in a memorandum or brief"). Furthermore, "[o]nly disputes over facts that might affect the outcome of the case under the governing law will prelude the entry of summary judgment." Anderson, supra, 477 U.S. at 248. If the contrary evidence is merely colorable, or is not significantly probative, summary judgment must be granted to the moving party. Id. at 249-50.

II. BIA'S SOF: MEC EITHER ADMITTED THE MATERIAL FACTS OR DID NOT REFUTE THEM WITH ADMISSIBLE EVIDENCE

1. The BIA demonstrated that MEC is an Arizona public service corporation regulated by the Arizona Corporation Commission ("ACC"). BIA SOF ¶ 1. MEC has admitted this. MEC's Answer and Motion to Dismiss BIA's Complaint, filed on October 5, 2005 ("Answer"), p. 37, ¶ 1. The BIA has shown that in its articles of conversion, MEC defined its objectives and purposes to be those that are set forth in the Arizona statutes governing electric utilities. BIA SOF, Exhibit 1, at Art. V (MEC articles of conversion). MEC concedes that its Articles of Incorporation (BIA SOF Exh. 1) are the best evidence of their contents. MEC SOF 1 ¶. Therefore there are no disputes over facts that might affect the outcome of the case under the governing law will prelude the entry of summary judgment (Anderson, supra, 477 U.S. at 248) concerning the allegations contained in BIA SOF ¶ 1.

2. The BIA alleged that on October 1, 1981, the BIA contracted with MEC (the "Contract"). BIA SOF ¶ 2. MEC has conceded that the Contract was made on October 1, 1981. Mohave Electric Cooperative Inc.'s Statement of Facts (Oct. 5, 2005), p. 1, ¶ 1, filed with its Answer. The BIA alleged that the Contract was between BIA and MEC. BIA SOF ¶ 2. MEC concedes that the Contract is the best evidence of its contents. MEC SOF ¶ 2. The Contract (BIA SOF Exh. 2, at

p. 1), shows it was executed by "Curtis Geighomah, Area Director" on behalf of the United States. MEC SOF Exh. 3 shows that Curtis Geighomah was the Assistant Area Director for the BIA. In its Answer, at ¶ 9, MEC did not deny that the Contract was made on October 1, 1981 as alleged in BIA's Complaint, ¶ 10, and is thus deemed to have admitted said allegation. Ariz. R. Civ. Proc. 8(d). MEC claims the Contract was assigned to the BIA, but MEC has failed to demonstrate that fact (MEC's merely offered evidence that a new contract number for the BIA was assigned to the Contract) and has failed to explain how its claim, if true, would affect the outcome of the case under the governing law. MEC's claim therefore will not bar the entry of summary judgment in favor of the BIA. See Anderson, supra, 477 U.S. at 248, The BIA has shown that one purpose of the Contract was to supply electricity to existing and future residential and commercial users in a rural area of Arizona, on the Havasupai and Hualapai reservations. BIA SOF ¶ 2 & BIA SOF Exh. 2 at 00008. MEC does not contest this fact, MEC SOF ¶ 2, and thus it is admitted.

3. The BIA has shown that MEC agreed to construct a 70 mile power line (the "Electric Line") from MEC's existing facilities, across the Hualapai Reservation, to a point of termination at the line side of the Long Mesa transformer. BIA SOF ¶ 3. MEC does not contest this fact (MEC SOF ¶ 3), and thus it is admitted. BIA has also shown that a line runs from that transformer to the bottom of the Canyon; that MEC would own the Electric Line as it sole property; that MEC agreed that once it constructed the Electric Line, BIA's usage of electricity would be metered and billed at the end of the line at Long Mesa. BIA SOF ¶ 3. MEC does not contest these facts (MEC SOF ¶ 3), and thus they are admitted.

MEC has agreed that the Contract is the best evidence of its contents. MEC SOF ¶ 3. MEC executed the Contract. BIA SOF Exh. 2, p. 1. The Contract (at p. 4), discusses the BIA's electrical line from Long Mesa to the Havasupai Village. BIA's Complaint (at ¶8) alleges that the BIA constructed an electrical line from the Long Mesa transformer at the top of the Grand Canyon down into the Canyon to its terminus at Havasupai Village. In its Answer (p. 39, ¶ 7), MEC admitted, or is deemed to have admitted by failing to deny, said allegations. See Ariz. R. Civ. Proc. 8(d) & BIA's Complaint at ¶ 8. Therefore there is no substance to the allegations contained in MEC SOF ¶ 3.

The BIA objects and moves to strike to MEC's SOF Exh. 2 as it is would not be admissible in evidence and thus should not be considered by the Commission. See Briskman v. Del Monte Mortgage Co., supra; Brichfield v. Theircoff, 5 Ariz App. 484, 428 P.2d 148 (1967). The subject document does not show that it was signed or sent by MEC or that it was timely received by the BIA. The Contract, BIA SOF Ex. 2, Addendum 1 at p. 9, provides the methods for service of written communication between the MEC and BIA and there is no showing that MEC SOF Ex. 2 was so delivered. Therefore, MEC SOF Exh. 2 is hearsay, is not admissible as an opposition to the BIA MSJ, and it does not refute the facts BIA alleged in ¶ 3 of its SOF.

4. The BIA agrees with MEC that to fund construction of the Electric Line, MEC was required to obtain a 2% loan from the Rural Electrification Administration. MEC SOF ¶ 4. The BIA reimbursed MEC for the cost of construction by paying MEC an annual "facility charge," one-twelfth due monthly. BIA SOF ¶ 4. MEC contends that the facility charge included more than the recovery of construction costs. MEC SOF ¶ 4. MEC concedes that the construction costs of the Electrical line constructed under the Contract was $1,145,651.55. MEC SOF ¶ 4. The BIA has demonstrated and MEC has not contested that by early 1982, MEC had completed construction of the Electric Line and began delivering electricity along it. Compare BIA SOF ¶ 4 with MEC SOF ¶ 4. The BIA has demonstrated, and MEC has not contested, that in March 1991, the BIA paid MEC the balance of the cost to construct the Electric Line that had not previously been paid under the facility charge. Compare BIA SOF ¶ 4 with MEC SOF ¶ 4.

MEC erroneously asserts that all issues relating to the Facility Charge were settled. Compare MEC SOF ¶ 4 with MEC SOF Exh. 4 at p. 2, ¶ 4 ("This waiver does not apply to any claim relating to payment made on or after January 15, 2003") and at p. 3, ¶ 5 ("the United States and the BIA do not waive rights to claim and recover overpayments of Arizona Corporation Commission approved tariffs for sales of electricity services received from 1992 through 2002").

MEC alleges improper foundation, MEC SOF ¶ 4, to the declaration of James C. Walker, BIA SOF Exh.4. Mr. Walker has been the facilities manager for the pertinent BIA agency, the foundation is set out in BIA SOF Exh. 4, and thus MEC's objection is invalid.

5. BIA has demonstrated that MEC has several large retail power customers, such as Chemstar and Cyprus Baghdad; that MEC contractually agreed to charge BIA for its electricity at a retail customer rate, schedule "L" or "large power;" that in addition to this retail rate for the electricity, the BIA paid MEC other charges, such as the cost of construction, sales taxes, property taxes, and an operation and maintenance fee; that MEC also charged a monthly fee of $4,582.60 per month for depreciation of the Electric Line; that at times, the depreciation charge was included in the "facilities charge;" and that from January 1982 through March 1997, the BIA paid MEC $838,615.80 for depreciation (183 months at $4,5862.80 per month). BIA SOF ¶ 5. Except for challenging for lack of proof BIA's assertion that MEC has several large retail customers and alleging an unspecific assertion as to the general the accuracy and materiality of the said facts and contending that the Facilities Charge issue was settled, MEC does not contest the facts set out in this paragraph. MEC SOF ¶ 5. Therefore, if the Commission finds the facts material and not settled, MEC has admitted the facts in this subparagraph except for the allegation of MEC having several large retail customers. The evidence that MEC has several large retail customers is taken from the Commission's own records, see BIA SOF ¶ 5 (citing BIA SOF Ex. 6 at pp. 1, 23), of which the Commission can take judicial notice.

6. The BIA has demonstrated that it has used, and continues to use, the electricity MEC transmits over the Electric Line to operate a BIA school and related facilities; government quarters for BIA teachers and law enforcement officers; a BIA detention facility; and a BIA maintenance building; that the Indian Health Services uses some of the electricity to operate a medical clinic at the bottom of the Grand Canyon; that members of the Havasupai Tribe living in Havasupai Village are consumers of electricity MEC delivers over the Electric Line; that members of the Havasupai Tribe living in Havasupai Village use the electricity MEC delivers over the Electric Line to operate fans, evaporative coolers and refrigerators in their homes; that in he summer months, the temperatures in Havasupai Village sometimes exceed 100 degrees Fahrenheit; and that while some members of the Havasupai Tribe have generators for temporary source of electricity, members residing in Havasupai Village have no other source of continuous electrical service other than the electricity MEC sends

over the Electric Line. BIA SOF ¶ 6. MEC claims improper foundation, MEC SOF ¶ 6, to the Affidavit of James C. Walker, BIA SOF Ex.4. The foundation is set out in BIA SOF Exh. 4 and thus MEC's objection is invalid. MEC also disputes the accuracy of Mr. Walker's assertions, but MEC fails to offer any admissible evidence that refutes Mr. Walker's assertions. MEC therefore has been deemed to admit the allegations.

7. The BIA demonstrated that MEC provided electricity to 13 retail customers located along the Electric Line and on the Hualapai reservation (the "Hualapai Retail Customers"); that MEC read the meters for these Hualapai Retail Customers and billed them directly; that for these Hualapai Retail Customers, MEC read their electrical meters, provided service calls, and billed these accounts; and that in July 2003, MEC wrote to the Hualapai Retail Customers and told them that the retail electric service MEC had provided to them had been "transferred to the BIA." BIA SOF ¶ 7. MEC has conceded that it served the 13 Hualapai Retail Customers. Compare BIA Complaint, ¶ 16, with the MEC Answer, p. 41, ¶ 14. MEC has admitted that the service to TCIA and to the BIA was retail service. See BIA SOF Exh. 9 & 10. MEC's assertion that it was serving the 13 customers as an agent for the BIA cannot be considered as an opposition to the BIA's motion for partial summary judgment. Stanley v. University of S. California, supra; Crimino v. Alway, 18 Ariz. App. 271, 273, 501 P.2d 447, 449 (Ct. App. 1972). MEC claims the Contract authorizes MEC to act as an agent for the United States (MEC SOF ¶ 7), but this is factually inaccurate and not supported as nothing in the Contract says that MEC is an agent of the BIA. See Contract, BIA SOF Exh. 2.

8. The BIA demonstrated that in MEC's 1990 application for a rate increase, MEC included the Electric Line in its rate base; that among other things, MEC's Cost of Service Study shows that the Electric Line was included in MEC's rate base to set the BIA rate; that over $1.3 million for the Electric Line was included in MEC's gross plant in service; that MEC was depreciating the value of the Electric Line as well as its metering capital on the Electric Line; that MEC allocated over $90,000 as working capital attributable to its Electric Line; that MEC charged its transmission expenses on its Electric Line; that MEC allocated in excess of $43,000 to its

administrative expenses to its Electric Line; that MEC paid property taxes in excess of $29,000 on its Electric Line; and that MEC paid other taxes in excess of $4,000 on its Electric Line. BIA SOF ¶ 8. MEC concedes that the Electric Line was included in MEC's application for a rate adjustment. MEC SOF ¶ 8. MEC's records submitted to the ACC state that the facilities used to serve the BIA were provided with special low cost financing that should be reflected in BIA's rates. MEC SOF ¶ 8; see also, BIA SOF Exh. 10, p. 57.

MEC contends that the plant, revenue and expenses relating to its Electric Line were allocated to the BIA, but provides no specific evidence to support this allegation (see MEC SOF ¶ 8) and therefore the contentions should be ignored and stricken. See Ashton-Blair v. Merrill, 187 Ariz. 315, 319, 928 P.2d 1244, 1245 (Ct. App. 1986) ("we strike the Statement of Facts contained in the answering brief for failing to cite a single record reference and because it appears that some statements are completely unsupported by the trial court record.") MEC's allegations concerning allocations of revenues and expenses are inadmissible and should be ignored. Tamsen v. Weber, supra; Crimino v. Alway, supra.

9. In its 1990 Decision, the ACC recognized that MEC was receiving substantial revenues from the BIA through the delivery of electricity over MEC's Electric Line (the "ACC 1990 Decision"). MEC SOF ¶ 9. The ACC changed the existing rate for the BIA from "Rate Schedule L (Large Power)" to "Contract Rate - Revised Exhibit '2'". See id. The ACC 1990 Decision also provided that "[a]ll service provisions are specified in the contract." Id. One of those service provisions was that MEC's delivery point was the line side of the Long Mesa transformer. See id.; see also Contract, BIA SOF Exh. 2 at p. 1, 8.

The citation urged by MEC in MEC SOF ¶ 9 (BIA SOF Exh. 6 at p. 19) shows that MEC collected $115,718.00 from BIA in the test year. The remainder of BIA SOF ¶ 9 is undisputed.

MEC argues that BIA did not exercise its option to renew the Contract. MEC SOF ¶ 9, 2nd ¶. MEC is incorrect as a matter of fact as the Contract does not contain a time within which it must be renewed, BIA SOF Exh. 2, p . 14, lines 6 – 7, and the BIA did renew the Contract. *See* Complaint, Exh. 4 & 10.

10. In 1998, the ACC issued a decision regarding MEC and unbundled service tariffs. BIA SOF 10; BIA SOF Exh. 11. Neither MEC nor the ACC differentiated the BIA from MEC's other retail customers. Id. MEC claims by the time it filed its unbundled tarrifs, it has already moved the meter back to its Nelson substation is not supported by any evidence, admissible or otherwise, and should be ignored. Tamsen v. Weber, supra; Crimino v. Alway, supra.

11. In approximately March 1997, MEC switched the BIA from a contract rate to a large commercial rate. BIA SOF ¶ 11. The BIA supported this fact with MEC invoices indicating reflecting the switch. BIA SOF Exh. 12. MEC admits it switched the BIA's rate. MEC SOF ¶ 11. MEC's purported explanation concerning the switch is inadmissible and should be ignored. Tamsen v. Weber, supra; Crimino v. Alway, supra.

12. On May 30, 1986, MEC filed with the ACC MEC's amended articles of incorporation. BIA SOF ¶ 12. In its amendment, MEC acknowledged its service area extended to Long Mesa (the end of the Electric Line). Id. MEC's purported explanation concerning BIA SOF ¶ 12 is inadmissible and should be ignored. Tamsen v. Weber, supra; Crimino v. Alway, supra. MEC claims its filings with the ACC is not a legally binding document. That may or may not be the case, but its ACC filings are admissions and therefore admissible evidence.

13. In the summer of 2003, MEC attempted to quit claim Electric Line to the BIA and the Hualapai and Havasupai Tribes. BIA SOF ¶ 13. MEC's purported explanation concerning BIA SOF ¶ 13 is inadmissible and should be ignored. Tamsen v. Weber, supra; Crimino v. Alway, supra. MEC asserts the quit claim is the best evidence. The quit claim (BIA SOF Exh. 14) demonstrates that MEC attempted to quit claim the Electric Line, so there is no factual dispute.

14. In about 1998, MEC moved the BIA's meter from the Long Mesa transformer to MIEC's Nelson substation, located at the beginning of the Electric Line. BIA SOF ¶ 14. Possibly as early as 1998 (but clearly by March 20, 2002), MEC began metering and charging BIA at MEC's Nelson substation. See id. MEC's response is not supported by admissible evidence and should be ignored. Tamsen v. Weber, supra; Crimino v. Alway, supra.

15. Since February 2006 the flow of electricity over the Electric Line was interrupted 19 times. BIA SOF ¶ 15. All of these interruptions resulted from problems with the Electric Line at locations between the Nelson substation and the Long Mesa transformer. Id. For each outage, the BIA has had to pay for the repairs. Id. When an outage occurs along the Electric Line, the BIA informs MEC. Id. Sometimes, however, MEC has responded that no one from MEC was available to check the Electric Line. Id. Moreover, since at least March 2004, MEC has refused to perform routine maintenance on the Electric Line. See id. MEC's purported explanation concerning BIA SOF ¶ 15 is not supported by admissible evidence, is inadmissible, and it should be ignored. Tamsen v. Weber, supra; Crimino v. Alway, supra.

16. In the summer of 2004, ACC chairman Marc Spitzer attempted to broker a resolution. BIA SOF ¶ 15. The BIA, MEC, and others, including ACC staff, sought to piece together a resolution, but those efforts unfortunately failed. See id. ACC staff then wrote MEC's counsel and informed MEC:

> The first point on which Commission Staff holds a firm opinion relates to the jurisdictional nature of the Hualapai line. The evidence is clear that MEC constructed the line to serve the Havasupai Tribe. It is also clear that the line has been used to provide retail electric service to a number of customers over its length since it was built. Finally, it is clear that the line was included in rate base in MEC's most recent rate case and that rates were approved by the Commission and charged for service over the line. In Commission Staff's view, it is undeniable that this line is necessary and useful to MEC in the provision of electric service to its customers.
>
> The second, and perhaps most important point to be made on behalf of Commission Staff relates to MEC's purported abandonment or quitclaim transfer of the line. Quite apart from the position stated by representatives of the United States that such abandonment cannot be effectively made, it is Commission Staff's opinion that any attempted transfer of the line without Commission approval would be void pursuant to A.R.S. § 40-285. Without regard to whether MEC received a Certificate of Convenience and Necessity to serve a particular geographic area, having commenced service, it cannot be abandoned without Commission approval.
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> * * *
>
> [I]t is crystal clear to Staff that MEC undertook an obligation to provide service as a public service corporation, obtained Commission approval of rates to charge, and included assets in rate base for recovery in rates. Under these circumstances, MEC cannot escape the obligation it has undertaken without first seeking Commission approval. (Emphasis added.)

MEC contends the letter is the best evidence. MEC SOF ¶ 16. The letter states exactly what the BIA quoted, so there is no factual dispute over the letter or its content.

III. BIA's RESPONSE TO MEC'S SUPPLEMENTAL SOF

The BIA responds to MEC's supplemental SOF (pp. 8-18) as follows.

1. Admitted.

2. Admitted.

3. Admitted.

4. Admitted.

5. Disputed. MEC SOF Exh. 11 is the best evidence of its contents.

6. Disputed. MEC's SOF Exh. 12 is an incomplete and inaccurate copy of 25 CFR. Part 175. A true copy of 25 CFR Part 175 was attached to MEC's response to the BIA MSJ as "MEC Exhibit 2" and it discloses on p. 628, "Authorities," citations that only concern the Colorado River, Flathead, and San Carlos Indian Irrigation Projects (49 Stat. 1039-1040; 54 Stat. 422; sec. 5, 43 Stat. 475 – 476; 45 Stat. 210 – 211; and sec. 7, 62 Stat. 273) as projects authorized to use the 25 CFR Part 175 regulations. See also, id. at "Sources" identifying the source of the Regulations as 56 FR 15136. 56 FR 15136 makes clear that 25 CFR does not authorize the BIA to operate an electrical project on the Havasupai or the Hualapai Indian Reservations as it provides in pertinent part:

> SUMMARY: The Bureau of Indian Affairs is revising regulations governing the electric power portion (utilities) of the Colorado River, Flathead, and San Carlos Indian irrigation projects. The purpose of these revisions is to provide for the consistent administration of the utilities, to establish procedures for updating the practices and procedures of the utilities so as to better reflect those of the industry, and to establish procedures to adjust electric power rates and service fees. The regulations determine the format for updating the practices and procedures of the utilities and the procedures for adjusting electric power rates (as needed) and service fees, with public involvement, to cover the expense of power and providing of service.

7. Disputed. MEC SOF Exh. 13 is the best evidence of its contents. MEC SOF Exh. 13 is an undated document that does not show that it ever was implemented or, if it was implemented, whether it is still in force. The exhibit also does not state that the consumer is

receiving electricity from the United States. Moreover, MEC's characterization of MEC SOF Exh. 28 is hearsay, not admissible and should be ignored. Tamsen v. Weber, supra; Crimino v. Alway, supra.

8. Disputed. MEC is not mentioned in MEC SOF Exh. 14. MEC's characterization of MEC SOF Exh. 28 is not admissible and should be ignored. Tamsen v. Weber, supra; Crimino v. Alway, supra.

9. Disputed. MEC SOF Exh. 15 is the best evidence of its contents. That exhibit states that the maintenance cost and administrative cost of an electrical utility and power distribution is not a BIA O&M function and that the BIA has not created a budgeting and maintenance process for electrical power, and that the Office of Facilities Management and the Regions had no money to pay for the stated costs.

10. Admitted.

11. Admitted.

12. Denied. The BIA admits it operates three electric utilities, Col0rado River, Flathead, and San Carlos. Federal statutes and regulations are publically available.

13. Disputed. MEC SOF Exh. 20 is the best evidence of its contents. MEC SOF Exh. 20 is the opinion of one person about what may occur in the future.

14. Admitted.

15. Admitted.

16. Admitted.

17. Disputed. MEC SOF Exh. 28 and 29 are the best evidence of its contents. MEC's characterizations of MEC SOF Exh. 28 and 29 are not admissible and should be ignored. Tamsen v. Weber, supra; Crimino v. Alway, supra.

18. Disputed. MEC SOF Ex.10 is an unsigned, undated and unaddressed document that is inadmissible. MEC's representations concerning MEC SOF Ex.10 are similarly not admissible and should be ignored. Tamsen v. Weber, supra; Crimino v. Alway, supra.

19. Admitted, except the allegation of "wholesale" is disputed. The term "wholesale" does not appear in the 1976 MEC documents relating to MEC and thus said allegation is not admissible and should be ignored. Tamsen v. Weber, supra; Crimino v. Alway, supra. Evidence of pre-contract negotiations is irrelevant an inadmissible and can not be used to alter the terms of a contract. Barron Bancshares, Inc. v.. United States, 366 F.3d 1360, 1376 (Fed. Cir. 2004).

20. Admitted.

21. Admitted.

22. Admitted.

23. Disputed. The letter is the best evidence and it indicates only that the contract number was withdrawn and new contract number was assigned.

24. Disputed. The term "wholesale" is not stated in the contract. Contract is the best evidence of its contents. MEC's characterizations of the Contract are similarly not admissible and should be ignored. Tamsen v. Weber, supra; Crimino v. Alway, supra.

25. Admitted.

26. Disputed. MEC SOF 35 is hearsay and inadmissible evidence and should be ignored. MEC's characterizations of MEC SOF Exh. 45 are similarly not admissible and should be ignored. Tamsen v. Weber, supra; Crimino v. Alway, supra.

27. Disputed. MEC SOF Exh. 36 is the best evidence of its contents. MEC's characterization of MEC SOF Exh. 36 is not admissible and should be ignored. Tamsen v. Weber, supra; Crimino v. Alway, supra. The Electric Line is not a transmission line.

28. Disputed. The passage quoted in MEC SOF 28 and referencing MEC SOF Exh. 20, at p. 1 of the 4 page paper, referred to actions in the 1980s, not 2002. *See id.*

29. Disputed. MEC's characterization of MEC SOF Exh. 37 and 38 are not admissible and should be ignored. Tamsen v. Weber, supra; Crimino v. Alway, supra. Moreover, MEC SOF Ex. 37 and 38 are hearsay and inadmissible. The Line is not a transmission line.

30. Denied. See the Complaint at Exh. 14 & 15. MEC's cited exhibit (MEC SOF Exh. 39) is a draft report, filled with hearsay, is inadmissible and should be ignored.

31. Admitted, except the allegation of "Acting Superintendent" is denied.

32. Admitted.

33. Disputed. MEC SOF Exh. 40 is the best evidence of its contents. MEC's characterization of MEC SOF Exh. 40 is not admissible and should be ignored. Tamsen v. Weber, supra; Crimino v. Alway, supra.

34 Disputed. MEC SOF Exh. 41 and 42 are the best evidence of its contents. MEC's characterizations of MEC SOF Ex 41 and 42 are not admissible and should be ignored. Tamsen v. Weber, supra; Crimino v. Alway, supra.

35. Disputed. MEC SOF Ex. 43 is the best evidence of its contents. MEC's characterization of MEC SOF Ex 43 is not admissible and should be ignored. Tamsen v. Weber, supra; Crimino v. Alway, supra.

36. Disputed. MEC SOF Exh. 44 is the best evidence of its contents. MEC's characterization of MEC SOF Exh 44 is not admissible and should be ignored. Tamsen v. Weber, supra; Crimino v. Alway, supra.

37. Disputed. MEC's statement contained in MEC SOF ¶ 37 is not admissible and should be ignored. Tamsen v. Weber, supra; Crimino v. Alway, supra. Statement is not supported by any citation. Whether the Contract was renewed is irrelevant.

38. Disputed. MEC SOF Exh. 36 is the best evidence of its contents. MEC's statement contained in MEC SOF 38 is not admissible and should be ignored. Tamsen v. Weber, supra; Crimino v. Alway, supra. Whether the Contract was renewed is irrelevant.

39. Disputed. MEC SOF Exh. 36 is the best evidence of its contents. MEC's statement contained in MEC SOF 39 is not admissible and should be ignored. Tamsen v. Weber, supra; Crimino v. Alway, supra. Whether the Contract was renewed is irrelevant.

40. Disputed. MEC's SOF Exh. 2 is an alleged 1992 letter and thus could not refer to alleged advice given in 1995. Letter is a draft letter that was not send to the BIA. Whether the Contract was renewed is irrelevant.

41. Disputed. MEC SOF Exh. 45 is the best evidence of its contents. MEC's statements contained in MEC SOF ¶ 45 are hearsay, not admissible and should be ignored. Tamsen v. Weber, supra; Crimino v. Alway, supra.

42. Disputed. MEC SOF Exh. 46 is the best evidence of its contents. Moreover, MEC's statement contained in MEC SOF ¶ 46 is not admissible and should be ignored. Tamsen v. Weber, supra; Crimino v. Alway, supra.

43. Disputed, except it is admitted that of MEC SOF Exh. 46 contains BIA complaints about MEC's unilateral changer in the point of metering and billing from Nelson substation and certain of MEC's billing practices. Moreover, MEC's statements contained in MEC SOF ¶ 43 are not admissible and should be ignored. Tamsen v. Weber, supra; Crimino v. Alway, supra.

44. Disputed, except it is admitted that on March 22, 2002, MEC responded. MEC's statement contained in MEC SOF ¶ 44 are not admissible and should be ignored. Tamsen v. Weber, supra; Crimino v. Alway, supra. Moreover, MEC SOF Ex. 47 is similarly hearsay, inadmissible, and should be ignored. Id.

45. Disputed. MEC SOF Exh. 27 is the best evidence of its contents. MEC's statement contained in MEC SOF ¶ 45 is not admissible and should be ignored. Tamsen v. Weber, supra; Crimino v. Alway, supra.

46. Disputed. MEC SOF Ex. 48 & 49 are the best evidence of their contents. MEC's statements contained in MEC SOF ¶ 46 are not admissible and should be ignored. Tamsen v. Weber, supra; Crimino v. Alway, supra.

47. Disputed. MEC's statement contained in MEC SOF ¶ 47 is not admissible and should be ignored. Tamsen v. Weber, supra; Crimino v. Alway, supra.

48. Disputed. MEC SOF Ex. 49 is the best evidence of its contents. MEC's statement contained in MEC SOF 45 is not admissible and should be ignored. Tamsen v. Weber, supra; Crimino v. Alway, supra.

49. Disputed. MEC SOF Ex. 49 is the best evidence of its contents Moreover, MEC's statement contained in MEC SOF ¶ 49 is not admissible and should be ignored. Tamsen v. Weber, supra; Crimino v. Alway, supra.

50. Disputed. MEC SOF Ex. 49 is the best evidence of its contents. Moreover, MEC's statement contained in MEC SOF ¶ 50 is not admissible and should be ignored. Tamsen v. Weber, supra; Crimino v. Alway, supra.

51. Admit that MEC attempted to quit claim the Electric Line in the summer of 2003. The rest of MEC's allegations are not factually supported and should be ignored. Tamsen v. Weber, supra; Crimino v. Alway, supra.

52. Disputed. MEC SOF Exh. 25 & 26 are the best evidence of their contents. MEC's statements contained in MEC SOF ¶ 52 are not admissible and should be ignored. Tamsen v. Weber, supra; Crimino v. Alway, supra.

53. Disputed. MEC provides no internal citation to MEC SOF Exh. 50 and should be ignored. See Ashton-Blair v. Merrill, supra. Furthermore, MEC SOF Exh. 50 appears to be a draft report, was not published by the BIA, and thus is hearsay and inadmissible.

54. Disputed. The exhibits are the best evidence of their contents. Part of SOF Exh. 51 attributable to Kenneth Saline is hearsay and thus inadmissible and should be ignored. Moreover, MEC's statements contained in MEC SOF ¶ 54 are not admissible and

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should be ignored. Tamsen v. Weber, supra; Crimino v. Alway, supra.

Respectfully submitted this 16 day of April, 2007.

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